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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 300

BEN W. FORTSON, JR., as Secretary of State of the State of Georgia; JAMES F. WHITE, Ordinary of Fayette County, Georgia; A. B. TOLLISON, Ordinary of Forsyth County, Georgia; ROBERT F. ABERCROMBIE, Ordinary of Douglas County, Georgia; and JIM W. DICKERSON, Ordinary of Cherokee County, Georgia,
Appellants,
vs.
HENRY J. TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON and JOHN L. GLENN,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

## MOTION TO ADVANCE
and
## STATEMENT AS TO JURISDICTION.

EUGENE COOK,
Attorney General of Georgia,

132 Judicial Building,
40 Capitol Square,
Atlanta, Georgia,

E. FREEMAN LEVERETT,
Deputy Assistant Attorney General,

Elberton, Georgia,

Attorneys for Appellant, Ben W. Fortson, Jr., Secretary of State, et al.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477

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Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

## MOTION TO ADVANCE.

Come now Ben W. Fortson, Jr., Secretary of State of the State of Georgia et al., appellants in the above stated case, and show as follows:

1.

The above case is an appeal by Ben W. Fortson, Jr., Secretary of State of the State of Georgia, and four Ordinaries of said State from an order and decree rendered June 30, 1964, by a three-judge court of the Northern District of Georgia, convened pursuant to 28 U. S. C. A.

2281 et seq., which, in addition to requiring reapportionment of the House of Representatives of the General Assembly of Georgia (the Senate having been reapportioned in 1962), also (1) Enjoined submission of a proposed new Constitution to the voters for ratification or rejection in the November, 1965 General Election, and (2) Limited the authority of the House of Representatives which convenes in January, 1965 (a) To service only during the 45 day session, and (b) To the consideration of "legislation".

2.

Movants show that the proposed new constitution the submission of which was enjoined by the Court below was the principal product of a 1964 special session of the General Assembly of Georgia, conducted at a cost of over one million dollars, in which said constitution received the overwhelming approval of both houses of the General Assembly, including the population-based Senate. Movants further show that the effect of the injunction below is to deny the right of all Georgians to express their choice in a general election in which the vote of every person counts the same as that of every other person.

3.

With respect to so much of the decree as relates to the House of Representatives, the effect is to prohibit said House from voting impeachment charges, conducting investigations or election contests, electing or removing a state auditor, submitting constitutional amendments, appointing interim committees or permitting them to function, and to prohibit the expenditure of funds for maintaining the offices of its Speaker and other officials after the end of the Session.

4.

Movants say that for the foregoing reasons, said decree is the most drastic ever rendered by any court, and places the State of Georgia virtually in a receivership.

5.

Motion for stay was denied by the Court below, and by Mr. Justice Black of this Court on July 6, 1964.

6.

Due to the imminence of the November General Election, and the period of approximately forty-five days prior thereto required for advertising and preparation of the ballot, unless this Court acts sometime not later than the middle of September, so much of the decree below as enjoins submission of the proposed new Constitution will become moot, and unless decision is rendered prior to January, 1965, the House of Representatives will be convened under circumstances of extreme confusion and uncertainty.

Wherefore, appellants, movants herein, pray that this case be advanced on the calendar and heard at the earliest possible moment, and that if possible, a special session of this Court be convened to hear the same.

EUGENE COOK,
The Attorney General of Georgia.
132 Judicial Building,
40 Capitol Square,
Atlanta, Georgia,

E. FREEMAN LEVERETT,
Deputy Assistant Attorney General,
Elberton, Georgia,

Attorneys for Appellants.

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Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

## STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of this Court, Ben W. Fortson, Jr., Secretary of State of the State of Georgia, et al,, Appellants, submit herewith this statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review permanent injunction granted by a special three-judge court, convened pursuant to 28 U. S. C. A. 2281, et seq., enjoining appellants (defendants below) from placing on the 1964 November general election ballot for submission to

the voters for ratification or rejection, a proposed new Constitution, as approved and submitted by a two-thirds vote of both Houses of the General Assembly, and undertaking to limit the Authority of the General Assembly which convenes in 1965 to the consideration of specified "legislation," and to function during the 45 day session only.

## OPINION BELOW.

The opinion rendered with respect to the decree herein appealed from, dated June 19, 1964, is not yet reported, but is attached hereto as "Appendix A." The decree rendered pursuant to the opinion just referred to, dated June 24, 1964, is attached hereto as "Appendix B." On June 30, the last-mentioned decree or order was revised, and is attached hereto as "Appendix C." The decision of the Court at an earlier stage of this litigation is reported as **Toombs v. Fortson**, 205 F. Supp. 248 (D. C. Ga. 1962).

## BASIS OF JURISDICTION.

I.

This case began as an action by appellees, residents of the two most populous counties of Georgia, attacking the apportionment under the Fourteenth Amendment of both houses of the General Assembly of Georgia, Constitution of Georgia, Art. III, Secs. II and III; Ga. Code Ann., §§ 47-101, 47-102. In an earlier appearance of the case, the district court held that one house of the General Assembly was required to be apportioned according to population. **Toombs v. Fortson**, supra. This was accomplished in 1962, when the Senate was reapportioned by division of the State into 54 single member districts containing substantially equal numbers of people. See Ga. Laws 1962, 2nd Ex. Sess., p. 7, 51. Following rendition of this Court's opinion in **Reynolds v. Sims**, ... U. S. ..., 32 L. W. 4535 (1964), plaintiffs below filed motion for further relief,

seeking in effect to require reapportionment of the House of Representatives. After hearing, the Court finally entered order on June 24, later revised June 30, 1964, which (1) declared unconstitutional the state constitutional and statutory provisions governing apportionment of the House of Representatives, (2) Enjoined defendants from placing on the 1964 General election ballot, a proposed new constitution approved by a 1964 extraordinary session of the General Assembly, and (3) in addition to requiring that a reapportioned House take office not later than January, 1966, undertook to limit the authority of the 1965 General Assembly to specified "legislation," and to function during the 45 day session only.

II.

Notice of appeal was filed below on July 1, 1964.

III.

The jurisdiction of this Court to review on appeal the permanent injunction rendered below is conferred by 28 U. S. C. A. 1253.

IV.

Cases which sustain the jurisdiction of this Court to review on direct appeal the permanent injunction issued by the three-judge court below are **Reynolds v. Sims**, ... U. S. ..., 32 L. W. 4535 (1964); **Davis v. Mann**, ... U. S. ..., 32 L. W. 4579 (1964); and **Roman v. Sincock**, ... U. S. ..., 32 L. W. 4583 (1964).

V.

The Georgia Constitutional and statutory provisions declared unconstitutional below are as follows:

(a) Constitution of Georgia of 1945, Art. III, Sec. III, Par. I (Code § 2-1501).

(b) Georgia Code, § 47-101, as amended.

Copies of these provisions are attached hereto as "Appendix D."

Provisions of the Georgia Constitutions of 1877 and 1945 governing amendment and revision of the Constitution, also drawn in question in this case, are attached hereto as "Appendix E."

## QUESTIONS PRESENTED.

1. Whether a federal district court in a reapportionment case involving one house of a state legislature, the other house already being on a population basis, has authority to grant relief not only requiring reapportionment of the house found to be defective, but also enjoining submission to the voters for ratification or rejection of a proposed constitution approved by a two-thirds vote of the State legislature?

2. Whether in such a case a federal court also is empowered to grant relief purporting to limit the matters which the legislature may consider pending reapportionment, and to further limit the House of Representatives from functioning except during the regular 45 day session?

3. Whether the district court erred in interpreting a state constitutional provision governing constitutional amendments contrary to the interpretation placed on a similar provision of a prior constitution by the highest court of the state?

4. Whether upon finding a provision of a state constitution governing constitutional amendments to be "doubtful," the federal district court erred in refusing to abstain from making an independent interpretation thereof pending a determination by state courts, but proceeded to make its independent interpretation, and based thereon, to enjoin submission to the voters of a proposed new constitution?

## STATEMENT OF THE CASE.

This case, an early aftermath of this Court's decision in **Reynolds v. Sims**, supra, draws in issue only the question as to the appropriateness of relief in a reapportionment case involving a state legislature. The question of apportionment standards under the Fourteenth Amendment is not in question here, for appellants do not appeal from so much of the decree below as requires that the House of Representatives of the General Assembly of Georgia be reapportioned on a population basis.

On April 4, 1962, four citizens of Georgia, residents of the state's two most populous counties, filed complaint against Ben W. Fortson, Jr., Secretary of the State of Georgia, and the Ordinaries of six counties in Georgia,[1] attacking the validity under the Fourteenth Amendment of the constitutional and statutory provisions governing apportionment of the House of Representatives[2] and state Senate.[3]

A three-judge court was convened pursuant to 28 U. S. C. A., §§ 2281, 2284, and after hearing, rendered its decision on May 25, 1962, declaring that ". . . [W]e determine and hold that so long as the Legislature of the State of Georgia does not have at least one house elected by the people of the State apportioned to population,

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[1] Under the Georgia law, the Secretary of State and county ordinaries are primarily responsible for the conduct of elections. See Ga. Code, Title 34.

[2] Constitution of Georgia, Art. III, Sec. III, Par. I (Code, § 2-1501); Ga. Code Ann., § 47-101.

[3] Constitution of Georgia, Art. III, Sec. II, Par. I (Code, § 2-1401); Ga. Code Ann., § 47-102. The complaint also attacked as being unconstitutional state statutes establishing a "rotation plan" whereby the nomination of candidates in the senate would be "rotated" among each of the counties in the senatorial district. See Ga. Laws 1946, p. 42, as amended; Ga. Laws 1950, p. 165; Ga. Laws 1939, p. 311.

it fails to meet constitutional requirements". With respect to relief, the Court declared, "We have concluded that we should postpone any further proceedings in this matter until the State has had a reasonable opportunity to meet the constitutional standards here laid down prior to the January, 1963, session." **Toombs v. Fortson**, 205 F. Supp. 248, 257, 259 (D. C. Ga. 1962).

Several clarifying opinions were later rendered by the Court, but none of them had the effect of changing the Court's original order.

Under the Constitution and laws of Georgia, members of the House and Senate were to be elected for two-year terms in the 1962 November General Election, and notwithstanding that the General Assembly had just completed one extraordinary session in April, an unprecedented second extraordinary session was called by the Governor which convened on September 27, 1962; to consider measures reapportioning one house in accordance with the Court's opinion.[4]

The General Assembly convened in extraordinary session as scheduled and enacted legislation and proposed a constitutional amendment, providing for reapportionment of the State Senate on the basis of 54 single member senatorial districts comprising substantially equal numbers of people (Ga. Laws 1962, 2nd Ex. Sess., pp. 7, 51). The constitutional amendment was ratified by the people in the 1962 November General Election, and also at said election, senators were elected in accordance with the new reapportionment legislation to take office in January, 1963. Litigation involving the validity of so much of this legislation as required county-wide voting for senators in multi-district counties is now before this court in an appeal entitled **Fortson v. Dorsey**, No. 1213, Oc-

[4] Ga. Laws 1962, 2nd Ex. Sess., p. 3.

tober Term 1963.[5] Other than as involved in the case last mentioned, the validity of the 1962 reapportionment legislation is not in question, the court below as well as plaintiffs herein having recognized that said legislation effectuated a valid reapportionment of the Georgia Senate on a population basis in accordance with federal constitutional stamlards. The State of Georgia thereby fulfilled its constitutional responsibility within the same year of the court's decision, without the necessity of a single injunctive order ever having been issued.

On June 17, 1964, two days after rendition of this Court's decision in **Reynolds v. Sims**, ... U. S. ..., 32 Law Week 4535, plaintiffs below filed motion for further relief, seeking to compel reapportionment of the House of Represenfatives of the General Assembly of Georgia.

Hearing on said motion was duly held on June 19, 1964, and on the same date the Court rendered an opinion and a proposed order. In its opinion, the Court declared that, "It is thus plain to all that the present Legislature is constituted in such a manner as to violate the Constitutional rights of the plaintiffs and the class which they represent."

With respect to relief, the Court noted that the General Assembly was at that time convened in special session considering the enactment of an election code, and the proposing of a new state constitution.[6]

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[5] For the decision below, see *Dorsey v. Fortson*, 228 F. Supp. 259 (D. C. Ga. 1964).

[6] This extraordinary session had been called by the Governor, primarily for the purpose of considering a new state constitution, without regard to any considerations of apportionment, but simply in response to widespread demand from all areas of the state, predicated upon the statutory detail of the 1945 Constitution which had made necessary over 380 amendments within less than 20 years. Consideration of the election code at this same session was merely an afterthought, suggested by the fact that while one house was considering the Constitution, the other house could be devoting its time to the election code.

With respect to the election code, the court observed that it could be changed by a subsequently reapportioned legislature merely by majority vote. With respect to the proposed constitution, however, the Court noted that it could be amended later only by a two-thirds vote of both houses, and ratification by the people. Also in this connection, the Court expressed doubt as to the validity of the pending constitutional revision procedure under the state constitution. In this respect, the Court had reference to a contention currently being made in the public press to the effect that because the Georgia Constitution made provision for specific, individual amendments by two-thirds vote of both houses and ratification by the people,[7] where as in another provision dealing with conventions of the people, reference is made to "revising the Constitution,"[8] the necessary inference is that the preparation of an **entirely new constitution** can be submitted only by a convention, which admittedly had not been the case as to the pending Constitution.[9]

On the basis of these considerations—federal law considerations as to malapportionment, and state law con-

[7] Constitution of Georgia, Art. XIII, Sec. I, Par. I.

[8] Id., Par. II.

[9] The proposed new Constitution was originally drafted by a "Constitution Revision Commission" created by law, the members of which were appointed by the Governor. See Ga. Laws 1963, p. 402. This draft was then submitted to the General Assembly where it received a vote of two-thirds of the members of both houses, including the population-based senate. The proposal would then be submitted to the people for ratification or rejection in the November 1964 general election. The identical procedure was employed in connection with the adoption of the 1945 Constitution under the 1877 Constitution which was for all purposes here identical to the 1945 Constitution as regards amendment procedures. See "Appendix E." In *Wheeler v. Trustees of Fargo School District*, 200 Ga. 323, 37 S. E. 2d 322 (1946), the Supreme Court of Georgia upheld the submission procedures utilized with respect to the 1945 Constitution and now being invoked with respect to the pending constitution, on the reasoning that the provision of the Constitution relating to conventions was not exclusive, but a limitation only if the convention procedure were followed.

siderations as to the legality of the proposed procedure—the court concluded:

> "Thus, while we feel it appropriate in the exercise of the judicial function to permit the General Assembly to reapportion itself, since the guidelines now established by the Supreme Court are plain and simple, we do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body" (See "Appendix A").

The Court then set forth a proposed order which, in addition to declaring unconstitutional the state constitutional and statutory provisions governing apportionment of the House of Representatives, also would (1) Enjoin submission of the proposed new state Constitution, and (2) Limit the authority of the 1965 General Assembly, pending reapportionment, (a) to specified "legislation", and (b) to functioning during the regular 45 day session.

Appellants filed response in opposition to this proposed order, but after hearing, the Court issued the order in substantially the same form as previously indicated, on June 24, 1964 (See "Appendix B"). The order was later revised on July 30 (Appendix C).

Application for stay was denied below, and by Mr. Justice Black of this Court on July 6, 1964.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

As previously stated, this case draws in question the appropriateness of relief in a reapportionment case beyond the mere compelling of reapportionment itself.

Essentially, the question is whether a federal court, having decreed reapportionment of one house of a state legislature, acts properly and within its authority in seeking to delimit the law-making process during the interim period pending reapportionment. Collaterally, the question is also presented here as to the duty of a federal court with respect to resolving doubtful questions of state law in such a way as to produce the most drastic of consequences—consequences which heretofore have not been wrought in any prior litigation of this nature.

This being a "voting rights" case, **Reynolds v. Sims**, 32 L. W. 4535, 4544, we think it anomalous that here the voting rights of **all** the citizens of Georgia are being not merely debased, but denied altogether, not by a malapportioned legislature, but by a federal court, the members of which were not voted on by anybody.

Moreover, the remedial relief complained of here was not prayed for by plaintiffs in their motion for further relief filed June 17, 1964. The first mention of such drastic relief came from one of the judges comprising the three-judge court on oral argument, whereupon, counsel for plaintiffs expressly disclaimed any desire for such relief.

Even when counsel for appellants proceeded to respond to the suggestion from the bench, he was admonished by another member of the Court, that no time need be consumed on this issue, because plaintiffs were not seeking such relief.

Notwithstanding, the court, *ex meru motu*, included two injunctive provisions in its proposed order of June 19 (Appendix A).

It was only thereafter that counsel for plaintiffs filed an amendment or "supplement" to the complaint, praying that the submission of the proposed Constitution be enjoined, apparently added out of fear that a court favorably inclined to their position would be otherwise offended if counsel did not ask for what the Court was obviously determined to grant them *nolens volens*.

Additionally, plaintiffs at no time have prayed for that part of the relief set forth in paragraph 3 of the injunctive order, and which undertakes to limit the authority of the 1965 General Assembly (Appendix C). This stands solely as relief desired by the Court itself.

### (a) The Order Enjoining Submission of the Proposed Constitution.

In addition to the considerations of state law hereinafter referred to, the Court predicated this feature of its order on the reasoning that the ill-effects of a malapportioned legislature would be frozen into the Constitution which would, because of the two-thirds vote of both houses required by the Constitution, be difficult to eliminate in the future. But if this be the case, are not the people themselves just as capable of reaching this same conclusion and resolving the issue at the ballot box in November by the very means which the Court below has denied them? Have democratic processes become so destitute in this country that people can no longer be trusted with important policy decisions, but must have them resolved by the judicial bench? Aside from this, the Court resolved this issue on an assumption that was neither plead at the outset, supported by evidence, nor supplied by judicial notice. There was nothing whatever

before the Court which would justify a finding that the proposed Constitution had been "loaded" by a rural-dominated legislature in such a manner as to induce acceptance of undesirable features in order to gain desirable ones. A finding which is not based on evidence denies due process. **Thompson v. City of Louisville,** 362 U. S. 199, 4 L. Ed. 2d 654 (1960). Nor can judicial notice be taken of matters not called to the attention of the parties, for to do so would be "to turn the doctrine into a pretext of dispensing with a trial." **Garner v. Louisiana,** 368 U. S. 157, 7 L. Ed. 2d 207 (1961).

But beyond these considerations, the more basic question here is the power of the federal court, in effect, to assume a trusteeship over the internal workings of state government, hardly less drastic in nature than placing the state in a receivership.

At the outset, it is undisputed that legislation enacted by a malapportioned legislature is valid notwithstanding such unconstitutional apportionment, **Cedar Rapids v. Cox,** 252 Iowa 948, 964, 108 N. W. 2d 253, 262 (1961); **State v. Latham,** 190 Kan. 411, 375 P. 2d 788, 789 (1962); **Ryan v. Tinsley,** 316 F. 2d 430 (C. A. 10th 1963), cert. den. 375 U. S. 17 (1963); **United States ex rel. Watkins v. Pennsylvania,** 214 F. Supp. 913 (D. C. Pa. 1963); **Barnes v. Ladner,** 241 Miss. 606, 131 So. 2d 458 (1961); **People v. Clardy,** 334 Ill. 160, 165 N. E. 638 (1929); **Dixie Fireworks Co., Inc. v. McArthur,** 218 Ga. 735, 130 S. E. 2d 731 (1963), and see the remarks of Mr. Justice Douglas, concurring in **Baker v. Carr,** 369 U. S. 186, 250, 7 L. Ed. 2d 663 (1962), where it was said, "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act (**Cedar Rapids v. Cox,** 252 Iowa 948, 964, 108 N. W. 2d 253, 262, 263; cf. **Kidd v. McCanless,** 200 Tenn. 273, 292 S. W. 2d 40) is plainly correct."

So being, a fortiori, a court is without power to enjoin the law-making process while in progress on identical grounds which would be insufficient to invalidate such legislation if enacted.

Even as to legislation deemed to be void, the Courts do not intervene until the enactment is complete.

In **Gaskins v. Dorsey**, 150 Ga. 638, 104 S. E. 433 (1920), it was said:

> "The judicial power will not be exerted to stay the course of legislation while it is in process of enactment; and this principle is applicable both to ordinary legislation and to the analogous course of an amendment to the constitution from the time of the introduction of the act proposing the amendment until the electors have acted."

See also, in accord, **Clayton v. Calhoun**, 76 Ga. 270 (1885); **Clements v. Roberts**, 230 S. W. 30, 144 Tenn. 129, reh. den. 231 S. W. 902, 144 Tenn. 152; **11 Am. Jur. 902**, Sec. 200; **16 C. J. S. 724**, Sec. 151 (1). The only exception is when the election itself would be illegal, in which case a taxpayer has standing to challenge the expenditure of public funds for holding an illegal election. See **Tolbert v. Long**, 134 Ga. 292, 67 S. E. 826 (1910), distinguished in the Gaskins case, supra.

As stated by this Court, "Litigation cannot arise until the moment of legislation is past." **Prentis v. Atlantic Coast Line Co.**, 211 U. S. 210, 228, 53 L. Ed. 150 (1908). The Court's function is "the more limited one of interpreting the law **as it now stands**," **Sinclair Refining Co. v. Atkinson**, 370 U. S. 195, 215, 8 L. Ed. 2d 440 (1962), and "The courts cannot in the one case forbid the passage of a law nor in the other the passage of a resolution, order or ordinance." **McChord v. L. & N. Railroad Co.**, 183 U. S. 483, 496, 46 L. Ed. 289 (1902), and see **Drew v. Scranton**, 229 F. Supp. 308 (D. C. Pa. 1963).

In **League of Nebraska Municipalities v. Marsh**, 209 F. Supp. 189, 194 (D. C. Neb. 1962), the district court refused to enjoin submission of a proposed constitutional amendment reapportioning the Legislature, based upon plaintiffs' contention that the amendment itself was unconstitutional, the court declining to consider the validity of the amendment in advance of its submission.

And, in the **Lucas case**, 32 L. W. 4557, decided by this Court June 15, this court approved the action of the district court below in permitting submission of a Constitutional amendment proposed by a mal-apportioned legislature.

In **Reynolds v. Sims**, supra, where the district court had expressed an opinion that a proposed constitutional amendment was void for failing to meet federal requirements, the district court nevertheless did not enjoin its submission to the voters. See 208 F. Supp. 431. There is another obvious difference. There the Court expressed an opinion only with respect to a single measure designed as a compliance with the Court's opinion. Here, the Court has gone outside the confines of the pending litigation to adjudicate with respect to an entirely new constitution, the apportionment provisions of which undisputedly are valid under equal protection requirements.[1]

In all six of the state reapportionment cases decided by this Court on June 15, 1964, it was expressly recognized that there would be an interim period during which a legislature determined to be mal-apportioned nevertheless would be permitted to continue. In **Maryland Committee v. Tawes**, ... U. S. ..., 32 L. W. 4573, 4578, this court of its own volition approved a two-year delay in reap-

[1] Article 2, Sec. 3, Par. 1 of the proposed Constitution provides that, "The House of Representatives shall consist of not less than one hundred sixty-two nor more than two hundred sixteen members and the apportionment thereof shall be as provided by the General Assembly."

portionment, and in the Virginia case, **Davis v. Mann**, ... U. S. ..., 32 L. W. 4579, 4583, a delay of approximately 1½ years was approved. Yet in none of these cases was it suggested that during this interim period, the legislatures thus constituted would be without plenary legislative power. Any other doctrine immediately raises difficult questions. If a legislature lacks power to exercise **some** law-making authority, how can it logically exercise **any** authority? Or, considered differently, can a federal court exercise a veto over a legislature, approving that legislation which it approves and rejecting that which it disapproves, on non-legal grounds?

(b) **Determination of the State Law Question.**

In addition to predicating its enjoining of the submission of the state constitution on federal grounds, the Court relied in part upon its "pendent jurisdiction" by construing the Georgia Constitution, and concluding that the proposed constitutional revision procedure then in progress was void under state law. As interpreted by the Court, the Georgia Constitution limits the adoption of an entirely new constitution to the convention method.

The present constitution of Georgia, that of 1945, was adopted by the same procedure which was being followed with respect to the pending constitution.

In **Wheeler v. Trustees of Fargo Consolidated School District**, 200 Ga. 323, 331, 37 S. E. 2d 915 (1946), the 1945 Constitution was attacked on this identical ground. The Georgia Supreme Court rejected this contention, holding that the provisions of the Constitution of 1877 governing constitutional conventions were not to be construed as defining the only way by which an entirely new constitution could be submitted, but merely as limitations upon the convention method should it be employed. It was said:

"With this as the basis from which we reason, is it true that this provision of the constitution of 1877 limits the power of the sovereign people to a convention as the only means by which they can have a completely revised or new constitution? The language does not say so. The section purports to do nothing more than to place limitations upon the legislative branch of government as to the manner in which a convention can be called by this branch of the government. If we should say that the sovereign people themselves can adopt a new constitution by the convention method only, we would by implication be writing into this clause of the constitution a limitation on the sovereign power of the people. We do not hesitate to say that a court is never justified in placing by implication a limitation upon the sovereign. This would be an unauthorized exercise of sovereign power by the court."

If this were not enough, the identical contention relied upon by the Court below had previously been made in the public press several weeks earlier, instigated so we are advised, by certain rural interests.

In response to a request from the Governor, the Attorney General of Georgia had, on May 28, 1964, rendered an opinion upholding the procedure being followed, in which it was concluded:

"Moreover, the language of the Supreme Court quoted above and the reasoning there employed is such as to make it clear that the same rule applies regardless of whether the question is raised before or after the proposal is ratified by the people, for the basis of the Court's opinion is not some far-fetched notion of estoppel, but rather the proposition that the provisions of the existing Constitution governing con-

ventions do not operate as an implied exclusion of all other means, but merely as a limitation upon the convention procedure should it be invoked."

* * * * * * * *

"There is another reason, however, why the same rule applies regardless of whether the challenge is made before or after the ratification. If the procedure of submission is illegal, the fact that a proposal is ratified by the people does not cure the illegal submission. **Seago v. Richmond County**, 218 Ga. 151; **Higer v. Hanson**, 67 Idaho 45, 170 P. 2d 411 (1946); **Stovall v. Gartrell**, ... Ky. ..., 332 S. W. 2d 256 (1960). Consequently, if the contention urged here be valid, a different result would have been compelled in the **Fargo** case, supra.

Secondly, the argument urged against the present procedure completely overlooks the most basic and fundamental of all principles of constitutional law: a state constitution is not a delegation or grant or power, but is only a limitation of power. **11 Am. Jur. 619**, Sec. 18; **16 C. J. S. 189**, Sec. 70; Cooley, **Constitution Limitations**, p. 126 (7th Ed.); **Tripp v. Martin**, 210 Ga. 284, and cf. Constitution, Art. III, Sec. VII, Par. XX (Code, Sec. 2-1920). So construed, Art. XII, Sec. I, Par. II, is merely a limitation upon the convention procedure, and does not elevate it to the status of an **exclusive** method."

Unless the Supreme Court of Georgia should overrule the **Wheeler case**, there can be but one answer to the question at issue, and this answer necessarily is contrary to the one given by the Court below. The provisions of the 1877 Constitution under which the 1945 Constitution was adopted, are in all material respects identical to those of the 1945 Constitution. See "Appendix E." But even

assume that the question was arguable—and in this respect the district court below conceded as much.[2]

Consequently, it follows that the Court erred in undertaking to resolve independently a state law question with such drastic consequences as accorded here, for the doctrine of equitable abstention applies in such cases. **1A Moore's Fed. Prac.**, § 203, p. 2101; **City of Meridian v. Southern Bell Telephone & Telegraph Co.**, 358 U. S. 639, 3 L. Ed. 2d 562 (1959). The doctrine applies to civil rights cases with a racial context. **Harrison v. N. A. A. C. P.**, 360 U. S. 167, 3 L. Ed. 2d 1152 (1959), as well as to those involving apportionment. **Lucas v. The Forty-Fourth General Assembly of Colorado**, ... U. S. ..., 32 L. W. 4557, 4558, footnote 2; **Swanson v. Illinois**, 226 F. Supp. 699 (D. C. Ill. 1964). And, as more recently declared by this Court,

> "It is not for us, however, to decide this question of Maryland law, or to reach a conclusion as to how the Maryland Court of Appeals would decide it. Such a course would be inconsistent with our tradition of deference to state courts on questions of state law." **Bell v. Maryland**, ... U. S. ..., 32 L. W. 4664 (June 22, 1964).

### (c) The Order Purporting to Limit the Authority of the 1965 General Assembly.

This injunctive order (Appendix C), granted without any pleadings or evidence whatever to support it, and without a single member of the General Assembly being made a party of record, in effect undertakes to tell the 1965 General Assembly what it can consider, and how long it can function, stated to be:

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[2] ". . . We do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality . . . :" ("Appendix A").

> ". . . the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly. . . ."

It is difficult if not impossible to determine fully the extent of this order, and appellants doubt seriously whether the Court itself understood its scope. Since, strictly speaking the proposing of constitutional amendments is not "legislation", **11 Am. Jur. 632**, § 28, it seems doubtful that the 1965 General Assembly could propose constitutional amendments, unless paragraph 2 of the order be construed as so authorizing (See Appendix C).

In addition to the enactment of legislation, the General Assembly otherwise has authority to vote bills of impeachment,[3] conduct investigations, election contests,[4] elect and remove a state auditor,[5] and grant pardons or other relief for persons convicted of treason.[6] Yet if the injunctive order here complained of be valid, none of these functions could be performed. Nor is it for us to speculate[7] as to whether the Court below intended the order to have this effect. It has not yet so stated, and appellees, no more than appellants, can speak for the Court.

In addition to imposing limitations as to the **subject matters** which the House (and consequently, in most cases,

---

[3] Constitution of Georgia, Art. III, Sec. VI, Par. III.

[4] Id., Sec. VII, Par. I; and see *Beatty v. Myrick*, 218 Ga. 629, 129 S. E. 2d 764 (1963).

[5] Ga. Code Ann., § 40-1801.

[6] Constitution of Georgia, Art. V, Sec. I, Par. XI.

[7] Appellees' Brief in Opposition to Motion for Stay, p. 12.

the Senate as well) may consider, the decree also undertakes to limit the **period** during which the House can function. While the decree contemplates that a reapportioned House need not necessarily take office until 1966, thereby requiring special elections in 1965, the plain intendment of the language of the decree is to prohibit the House from functioning at all after the regular 45-day session adjourns in early 1965.[8] This would preclude the convening of any special sessions of the General Assembly should the occasion arise, the appointment or functioning of any interim committees, and would even render illegal the expenditure of state funds to maintain the offices of the Speaker, Floor Leader and other officials. After adjournment of the 45-day session which convenes in January, state government would become paralyzed, and incapable of dealing with any emergency that might require immediate attention.

For the same reasons urged with respect to so much of the order as enjoined submission of the proposed new constitution, it is submitted that this part of the order is similarly erroneous. Both are predicated upon the assumption that because the Court can decree reapportionment, it can likewise supervise all phases of the internal affairs of the legislature pending compliance.

This, we submit, is not within the scope of relief contemplated by this Court's decisions of June 15th.

## CONCLUSION.

When the first decision of the district court below was rendered in May, 1962, the State of Georgia reapportioned its state senate within the short period of approximately six months—a national record so far as we are able to determine. Now that the court has spoken again,

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[8] Constitution of Georgia, Art. III, Sec. IV, Par. III (Code Ann., § 2-1603, Supp.).

the state will in like manner move with all expedition to discharge its constitutional obligations at the earliest practical moment. Such fidelity to the Constitution should not be repaid during the interim with a harsh decree which virtually places the state in a receivership. The judgment below should be reversed.

EUGENE COOK,
Attorney General of Georgia,
132 Judicial Building,
40 Capitol Square,
Atlanta, Georgia,

E. FREEMAN LEVERETT,
Deputy Assistant Attorney General,
Elberton, Georgia,
Attorneys for Appellants.

## APPENDIX "A".

### OPINION AND PROPOSED ORDER OF THE COURT OF JUNE 19, 1964.

Following the publication of opinions by the United States Supreme Court on Monday, June 15, 1964, in the case of Reynolds v. Sims, et al., and companion cases dealing with the apportionment of seats in the Legislatures of the states of Alabama, New York, Maryland, Virginia, Delaware and Colorado, the plaintiffs have moved for further immediate relief to be made effective before the elections now scheduled to be held in November of this year to the General Assembly of the State of Georgia.

In our earlier order we held:

> "Viewing the extreme disparities existing in both Houses of the Legislature, against the background of the several factors which we have taken into consideration, we are forced to the conclusion that the present composition of the Georgia Legislature amounts to invidious discrimination against the plaintiffs and all others who are residents of the counties in which plaintiffs reside."

We then held that the Georgia Legislature as thus constituted was illegally apportioned so long as it was composed of two Houses, neither of which was apportioned according to population. We then said:

> "We do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the plaintiff his constitutional rights the State Legislature must be constituted of two Houses, both of which are elected according to population.
>
> ". . . It is not necessary for us at this time to make

a final determination on the question whether, if one House of the General Assembly of Georgia is elected according to population, the other House may remain **as completely unrelated to population ratios as it is today.**" (Emphasis added.)

This Court then retained jurisdiction for the entry of such other and further orders as might be required.

In its decision in the Reynolds case, the Court held that "as a basic constitutional standard, the Equal Protection clause requires that the seats in both houses of bi-cameral state legislatures must be apportioned on a population basis."

The Court added further that "the Equal Protection clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

In our earlier order we especially noted the disparity of representation between the 1-vote and the 3-vote counties. This disparity appears as its most extreme dimensions by contrasting Echols County, which has one representative and a population of 1876, with Fulton County with its three representatives for 556,326 persons—one representative per 1,876 in Echols, as contrasted with 1 representative per 185,442 in Fulton, a disparity of approximately 100 to 1 as between the most populous and the least populous counties of the state.

It is thus plain to all that the present Legislature is constituted in such a manner as to violate the constitutional rights of the plaintiffs and the class which they represent. The question now posed by the present motion is: What is required to give the under-represented citizens of the State their legal due? There is then the further question: How quickly should this relief be granted?

With rare exceptions, the Courts declare the legal rights of the parties as of the time of the Courts' decisions. It is somewhat of a novelty in constitutional law for a court to find that a party is being deprived of constitutional rights, but that he is not entitled to immediate vindication of such rights. Well-known exceptions are the school desegregation cases, Brown et al. v. Board of Education of Topeka, 347 U. S. 483, and 349 U. S. 294, and B. A. Reynolds etc., et al., v. M. O. Sims, et al., dec. June 15, 1964. 32 L. W. 4535, and companion cases decided this week. In Reynolds v. Sims the Court, after making it plain that each House of a bicameral legislature must be apportioned as nearly as practicable in accordance with population, said:

> "It would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent, and a state's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles."

It is plain that the Supreme Court considered it to be the unusual case that would deny all relief to the underrepresented citizen who had brought his action sufficiently far in advance of an election to warrant the court's granting immediate relief. The respondent Secretary of State

here contends that this is such an unusual case and that the court should not interpose any injunctive relief until after the State Legislature is given an opportunity at its regular session in 1965 to set its own house in order.

Under existing laws certain prospective candidates for election to the House of Representatives for Georgia have already met all of the party qualifications necessary to have their names on the ballot in the fall elections. Moreover, we are advised that the entry dates for qualification as candidates for the Democratic Party Primary have already been closed and entrance fees have already been paid. Although it would be physically possible for a time-table to be devised under which an additional special session of the Georgia Legislature might be called into session and a reopening of the lists for qualifying new candidates could be arranged, and primaries could be held in time for a properly apportioned Legislature to be elected in November, 1964, the Court concludes that adequate protection of the rights of plaintiffs and their class can be afforded without so greatly interfering with the normal election procedures in this election year.

The Georgia Legislature is now in extraordinary session. It was called for limited purposes, and it is limited by law to consideration of the objects for which it was called. Principal among these are (1) the adoption of new election laws, and (2) the proposing of a new State Constitution. In a very real sense these two Legislative objectives are of paramount interest to every resident of Georgia—much more so than the usual run of legislative acts of a session of the General Assembly. The reason for this is plain. The election laws that are under consideration will control the future elections in the state of Georgia, including the elections at which the members of the legally apportioned legislature are to be elected. As relates to the constitution, it will be the basic law of

the state until and unless amended in the future. Such future amendment can be proposed only by a two-thirds vote of the two houses of a properly apportioned General Assembly.

Thus, we must necessarily decide whether it is consistent with the Supreme Court's mandate for the Court to stand aside and permit this improperly constituted legislative body to enact the new election code for the state, and also to perform legislative acts necessary to propose a new constitution for the state of Georgia. So far as the election laws are concerned, these would be readily subject to amendment or repeal by a simple majority of both houses of the properly apportioned General Assembly. However, the matter of the constitution presents a more serious problem. We emphasize the significance of this point, because of the Georgia constitutional policy, as expressed in the Georgia constitution since 1868, providing that a new constitution of the state of Georgia, if proposed by a constitutional convention, **must be by a convention whose members are selected on the basis of population.**[1]

There is no provision in the Georgia Constitution for the adoption of an entirely new constitution by action of the state legislature followed by approval of the voters at a General Election. We recognize that, nevertheless, in 1945, this procedure was followed and the present special session of the General Assembly is pointing toward the same end. The validity of this procedure was brought in question after the election in 1945 was carried in favor of the new constitution. The Supreme Court of

[1] The Georgia Constitution provides, Section 2-8102: "No convention of the people shall be called by the General Assembly to revise, amend, or change this Constitution, unless by the concurrence of two-thirds of all members of each House of the General Assembly. *The representation in said convention shall be based on population as near as practicable. . . .*" (Emphasis added.)

Georgia found that the new constitution was duly approved and in effect on reasoning which appears to have been based on the fact that once the election was held and the people approved the draft amendment, it could not be nullified or set aside. See **Wheeler v. Trustees of Fargo District**, etc., 200 Ga. 323, 37 S. E. 2d 322. The Georgia Supreme Court has not held that the legislature has the power to propose a new constitution for adoption in the manner in which it proceeded in 1945 and in the manner in which the present session of the legislature is proceeding. It appears that such procedure is in conflict with the basic principle announced in the Georgia constitution to the effect that the adoption of a new constitution must be the work of a constitutional convention constituted by representatives of the people based on population "as near as practicable."

Thus, while we feel it appropriate in the exercise of the judicial function to permit the General Assembly to reapportion itself, since the guidelines now established by the Supreme Court are plain and simple, we do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is, as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body.

An accommodation between the relief which would permit the Legislature to reapportion itself, and yet which would leave to such reapportioned Legislature the performance of its legislative duty looking towards the adoption of a new constitution, can, we think, be accomplished by our entering an order along the following lines:

(1) The provisions of Article III, Sec. III, paragraph I, of the Constitution of the State of Georgia of 1945

(Ga. Code 2-1501), are void because they are in conflict with the Fourteenth Amendment to the Constitution of the United States.

(2) The provisions of Georgia Code Section 47-101, as amended (Acts 1921, p. 229; 1931, p. 48; 1941, p. 348; 1951, pp. 26-27; 1953, pp. 10-11, and 1961, p. 111) are void because they are in conflict with the Fourteenth Amendment of the Constitution of the United States.

(3) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted.

(4) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that the service of the members of the General Assembly of the state of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 45-day session, as provided in the Georgia constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements, and as may be necessary to permit the holding of elections to the newly constituted General Assembly.

In order that the Court may be fully apprised of the effect which such an order would have on the proper functioning of the state government, and the holding of the elections this year, it is

Ordered that the defendants show cause, if any they have, on the 24th day of June, 1964, at 2:00 P. M., why the foregoing order should not be entered by this Court.

This 19th day of June, 1964.

/s/ Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge.

/s/ Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge.

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

## APPENDIX "B".

### ORDER OF THE COURT OF JUNE 24, 1964.

**Order.**

The Court having heard oral argument on the order to show cause entered by it on the 19th day of June, 1964, and being advised in the premises,

It is now Ordered, Adjudged and Decreed as follows:

(1) Article III, Section III, Paragraph I (Code, Section 2-1501) of the Constitution of Georgia of 1945, and Section 47-101 of the Code of Georgia, as amended, are hereby declared to be prospectively null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States, for elections to the House of Representatives after the General Election to be held in November, 1964.

(2) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the state of Georgia which are separate as to subject matter, in accordance ith Article XIII, Section I, Article 1, of the Constitution of the state of Georgia, 1945. (See **Hammond v. Clarke**, 136 Ga. 313, for a discussion by the Georgia Supreme Court of what constitutes separate amendments.) Nor shall anything in this order prevent the calling by the General Assembly of a "convention of the people to revise, amend or change

the constitution" if the representation "in the convention is based on population as near as practicable" with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945.

(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that the service of the members of the General Assembly of the state of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements, and as may be necessary to permit the holding of elections to the newly constituted General Assembly.

The Court will retain jurisdiction of this cause for such other and further orders as may be necessary.

This 24th day of June, 1964.

/s/ Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge.

/s/ Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge.

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

## APPENDIX "C".

### FINAL ORDER OF THE COURT OF JUNE 30, 1964.

**Revised Order.**

All parties having consented thereto, the order of the Court dated June 24, 1964, is hereby revised to read as follows:

It is now Ordered, Adjudged and Decreed as follows:

(1) Article III, Section III, Paragraph I (Code Section 2-1501) of the Constitution of Georgia of 1945, is hereby declared to be null, void and inoperative as being in conflict with the Fourteenth Amendment to the Constitution of the United States.

Section 47-101 of the Code of Georgia, as amended, is hereby declared to be prospectively null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States for elections to the House of Representatives after the General Election to be held in November of 1964.

(2) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the State of Georgia which are separate as to subject matter, in accordance with Article XIII, Section I, Article 1, of the Constitu-

tion of the State of Georgia, 1945. (See **Hammond v. Clarke,** 136 Ga. 313, for a discussion by the Georgia Supreme Court of what constitutes separate amendments.) Nor shall anything in this order prevent the calling by the General Assembly of a "convention of the people to revise, amend or change the constitution" if the representation "in the convention is based on population as near as practicable" with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945.

(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2-1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly, said elections to be held at such times as may be necessary to permit the Members of such General Assembly to take office as soon as practicable, but in no event later than the second Monday in January, 1966.

The Court will retain jurisdiction of this cause for such other and further orders as may be necessary.

This 30th day of June, 1964.

Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge.

Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge.

Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

## APPENDIX "D."

**Constitutional and Statutory Provisions Governing Apportionment of Members of the House of Representatives of the General Assembly of Georgia.**

Georgia Constitution of 1945, Article III, Sec. III:

Paragraph I.—**Number of representatives.**—The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.

Paragraph II.—**Apportionment changed, how.**—The above apportionment shall be changed by the General Assembly at its first session after each census taken by the United States Government in accordance with the provisions of Paragraph I of Section III of this Article.

Georgia Code Ann.:

47-101.—**House of Representatives; membership apportioned.** The membership of the House of Representatives shall be as follows: Three members each from the counties of Fulton, DeKalb, Chatham, Muscogee, Bibb, Richmond, Cobb, Dougherty; two members each from the counties of Floyd, Hall, Lowndes, Troup, Clayton, Clarke, Walker, Gwinnett, Whitfield, Glynn, Houston. Carroll, Spalding, Thomas, Ware, Baldwin, Colquitt, Laurens, Coweta, Bartow, Coffee, Polk, Decatur, Sumter, Bulloch, Upson, Tift, Cherokee, Catoosa, Newton; and one member each from each of the other counties of the State.

## APPENDIX "E".

### Constitutional Provisions Governing Amendment and Revision of the State Constitution.

I.

**Constitution of 1877, Art. XIII, Sec. I.**

Paragraph I. **Proposal by General Assembly; submission to people.** Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon. And the General Assembly shall cause such amendment or amendments to be published in one or more newspapers in each Congressional District, for two months previous to the time of holding the next general election and shall also provide for a submission of such proposed amendment or amendments, to the people at said next general election, and if the people shall ratify such amendment or amendments, by a majority of the electors qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of this Constitution. When more than one amendment is submitted at the same time they shall be so submitted as to enable the electors to vote on each amendment separately.

Paragraph II.—**Convention, how called.** No Convention of the people shall be called by the General Assembly to revise, amend or change this Constitution, unless by the concurrence of two-thirds of all the members of each house of the General Assembly.. The representation in said convention shall be based on population as near as practicable.

Note: The Georgia Constitution was adopted under the 1877 Constitution by a procedure set forth and held legal in **Wheeler v. Board of Trustees of Fargo Consolidated School District**, 200 Ga. 323, 37 S. E. 2d 322 (1946). The identical procedure is being employed with respect to the proposed new state constitution, enjoined by the district court below.

II.

**Constitution of 1945, Art. XIII, Sec. I.**

Paragraph I.—**Proposal by General Assembly; submission to people.** Any amendment to this Constitution may be proposed by a resolution in the Senate or the House of Representatives, and if the same shall be agreed to by two-thirds of the members elected to each branch of the General Assembly, such proposed amendment shall be entered on the journals of each branch with the Ayes and Nays taken thereon. Any proposed amendment may be repealed or amended by the same General Assembly, if done so at least two months prior to the date of the election at which such proposed amendment is to be submitted.

The Governor, the Attorney General, and the Secretary of State shall meet and determine whether a proposed amendment is general, and if not general, shall determine what political subdivision or subdivisions are directly affected by such proposed amendment. If a proposed amendment is general, the Governor shall cause such proposed amendment to be published in full once each week for three consecutive weeks immediately preceding the date of the election at which such proposed amendment is submitted, in one newspaper of general circulation in each Congressional district of the State. If such proposed amendment is not general, the Governor shall cause such

proposed amendment to be published in full in one newspaper of general circulation in each county in which the directly affected political subdivision or subdivisions are located. In the event no such newspaper is located in such county, a newspaper in an adjoining county shall be used.

Any proposed amendment which is general shall be submitted to the people of the entire State at the next general election at which members of the General Assembly are elected, and if ratified by a majority of the electors qualified to vote for members of the General Assembly voting thereon, such amendment shall become a part of this Constitution. A proposed amendment which is not general shall only be submitted to the people of the political subdivision or subdivisions directly affected. The votes of the electors in each political subdivision affected shall be counted separately in determining whether such proposed amendment is ratified, and it must be ratified by a majority of the electors qualified to vote for members of the General Assembly voting thereon in each such political subdivision before it shall become a part of this Constitution. The General Assembly, in the resolution, shall state the language to be used in submitting the proposed amendment.

When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately.

Paragraph II—**Convention, how called.** No convention of the people shall be called by the General Assembly to revise, amend or change this Constitution, unless by the concurrence of two-thirds of all members of each house of the General Assembly. The representation in said convention shall be based on population as near as

practicable. This Constitution shall not be revised, amended, or changed by the Convention until the proposed revision, amendment, or change has been submitted and ratified by the people in the manner provided for submission and ratification of amendments proposed by the General Assembly.

Paragraph III--**Veto not permitted.** The Governor shall not have the right to veto any proposal by the General Assembly to amend the Constitution.